Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

HELEN WATSON AND RIX WATSON,
Petitioners,
v.
REUBEN ISERN, M.D.
Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED

1. Did the Supreme Court of Texas violate the Watsons' "due process of law" and "equal protection of the law" guarantees under Amend. 14, § 1, U.S.Const., in reversing the judgment of the Ninth Court of Appeals of Texas setting aside the judgment of trial court permitting a "reduced supersedeas bond" of only $500,000 to suspend execution upon Watsons' $3.1 million judgment, based upon the Court's holding that court-promulgated Rule 47(b)(1), Texas Rules Appellate Procedure, permitting a reduced supersedeas bond, controls over Chapter 52, § 52.002 and § 52.005, Texas Practice and Remedies Code, which (1) forbids a "reduced supersedeas bond in personal injury cases" and further (2) forbids the Texas Supreme Court from adopting or enforcing any appellate rules in conflict with Chapter 52 of the Code? In short, did the Supreme Court violate well-established constitutional law that where a court rule conflicts with a statute, the rule must "yield" to the statute?

2. Did the Supreme Court of Texas violate the Watsons' "due process of law" and "equal protection of the law" guarantees under Amend. 14, § 1, U.S.Const., by "usurping" Legislative powers, and in holding that the Watsons' right to execution on their $3.1 million "personal injury judgment" in absence of a full statutory supersedeas bond under Chapter 52, Texas Practice and Remedies Code, did not conflict with court-promulgated Rule 47(b)(1), T.R.A.P., which permits a reduced supersedeas bond based upon a trial court's "discretionary findings" that (a) funding the full "statutory supersedeas bond or security" would cause harm to the judgment-defendant, and that (b) a reduced supersedeas would not cause injury to the judgment-

plaintiff? The Court violated the "separation of powers" of the Legislature and Judiciary by "rewriting" an unambiguous, constitutional Texas "public policy" statute enacted by the Legislature.

3. Did the Supreme Court of Texas violate the Watsons' "due process of law" and "equal protection of the law" guarantees under Amend. 14, § 1, U.S.Const., and Art. 1, § 3 (equal rights), Art. 1, § 13 (open courts), Art. 1, § 19 (due process), and Art. 1, § 28 (no power of courts to suspend laws of the State shall be exercised except by the Legislature), Texas Const., in "usurping" powers of the Legislature in violation of state and federal constitutions relating to executions upon final judgments, and in holding that court Rule 47(b)(1), T.R.C.P., does not conflict with Chapter 52, Tex.Rem.Code, which denied a "reduced supersedeas to suspend execution on a personal injury judgment" pending appeal?

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WATSONS' PETITION FOR WRIT OF CERTIORARI

To the Honorable Justices of the United States Supreme Court.

HELEN WATSON and RIX WATSON, Petitioners, the **real parties at interest** as judgment-creditors of Dr. Reuben A. Isern, have timely filed their petition seeking this Court's review of a final judgment of the Supreme Court of Texas reversing a judgment of the Ninth Court of Appeals setting aside a trial court order granting a "reduced supersedeas bond" to suspend execution upon their judgment. **Isern v. Ninth Court of Appeals**, 925 S.W.2d 604 (Tex. 1996).

JUDGMENTS AND OPINIONS BELOW

Mrs. Watson suffered an amputation of her leg as a result of delay in treatment of a ruptured popliteal artery as a proximate cause of the negligence of Dr. Isern in misdiagnosing her injury following a fall. Based upon a jury verdict, the trial court entered judgment against Dr. Isern on July 7, 1995, for $3.1 million, which included prejudgment interest, plus costs of court. The judgment awarded 10% postjudgment interest on the judgment, compounded annually, until paid. After Dr. Isern's insurer appealed without filing a supersedeas bond, the Watsons obtained an execution on the judgment. Dr. Isern then filed a motion in the trial court for a "reduced supersedeas bond" to suspend execution, which was granted on November 29, 1995, and permitted Dr. Isern's insurer ("ICA") to suspend execution on the $3.1 million judgment by depositing only $500,000 in securities with the district clerk. The bond ignored costs of court, prejudgment interest, and postjudgment interest. APPENDIX C.

On the Watsons' appeal of the order permitting a "reduced supersedeas bond," the Ninth Court of Appeals of Texas reversed the trial court's order on March 21, 1996, and ordered a "full statutory supersedeas bond or security." APPENDIX B. Dr. Isern then filed a petition for mandamus in the Texas Supreme Court. In a "Per curiam" opinion entered June 14, 1996, the Supreme Court reversed the judgment of the Ninth Court of Appeals and affirmed the trial court's judgment. APPENDIX A. Pursuant to the Supreme Court's judgment, the Ninth Court of Appeals vacated its judgment on June 20, 1996. APPENDIX D. The Watsons filed a timely motion for rehearing and supplemental motion which were denied without a formal opinion by the Supreme Court on August 16, 1996, with a notice letter to counsel advising the Court had "overruled the motion for rehearing, as supplemented." The Watsons' petition for certiorari was filed in this Court within 90 days after the highest state court denied their motion for rehearing. S.Ct. Rule 13.

BASIS OF JURISDICTION OF THE SUPREME COURT

Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1257(2) and Sec. 1254, and this Court's Rules 10(b) and 10(c).

Federal appellate review of judgments rendered by state courts can only occur in the United States Supreme Court by writ of certiorari. **District of Columbia Court of Appeals v. Feldman**, 460 U.S. 462 (1983). Petitioners' asserted violations of their state and federal constitutional rights is reviewable by this Court based upon Amend. 14, § 1, U. S. Constitution, and Art. 1, § 3, 13, 19 and 28, Texas Const., as stated herein.

HOW THE FEDERAL QUESTIONS WERE RAISED AND PASSED UPON

The Texas Supreme Court **violated** law related to the constitutional "separation of powers" existing between the Legislature and the Judiciary in holding court Rule 47(b)(1) "trumps" Chapter 52 which prevents a reduced supersedeas bond to suspend a "personal injury judgment pending appeal," ignoring law as stated in **U. S. v. Estep**, 151 F.Supp. 668, affd. 251 F.2d 579 (D.C.Tex. 1957):

"Judges must keep out of the jury box, and judges of the high court must keep out of the legislative halls."

This Court has yet to address the specific constitutional question raised in this petition; however, the Court had the basic questions before it in **Pennzoil Co. v. Texaco, Inc.**, 107 S.Ct. 1519 (1987), but refused to review the constitutional question based upon lack of jurisdiction.

This Court's discretionary review of the judgment of the highest court in Texas is mandated because of the important issues of constitutional law which (1) involves a decision of the state court on an important federal question in a way that conflicts with the decisions of another state court of last resort or of a United States court of appeals; (2) involves an "important question of federal law" that has not been, but should be, settled by this Court, and (3) involves an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioners' reply briefs and motion for rehearing in the Texas Supreme Court asserted Legislative Chapter 52, Tex. Rem.Code, prevailed over court Rule 47(b)(1), T.R.A.P., and that any judgment denying execution in absence of a "full supersedeas bond" as mandated by Chapter 52 was a denial of the Watsons' due process of law and equal protection of the law guarantees under the 14th

Amend., § 1, U.S. Const.. Where a conflict exists between a court rule and a statute, the rule must "yield" to the statute. Because Chapter 52 of the Code provides the Supreme Court "**shall not** enact any appellate rule to contrary," the court, in effect, was "enjoining" an execution on the Watsons' personal injury judgment by a state action in a constitutional violation of Chapter 52.

Because **Laird v. King**, 866 S.W.2d 110 (Tex.App.-Beaumont 1993), had decided the exact federal issues as to constitutionality of Chapter 52 **versus** the appellate rule, and Petitioners' appeal of the trial court's order granting a reduced supersedeas bond would be decided by that court, **and the Supreme Court had not acted on an identical constitutional attack in a mandamus filed in Laird**, there was no legal necessity for the Watsons to attack the trial court's order for a reduced supersedeas -- the handwriting was on the wall, the Ninth Court would reverse. As anticipated by the Watsons, the Ninth Court of Appeals reversed the trial court's judgment, holding Chapter 52 of the Code controlled over court Rule 47(b) in connection with supersedeas of a "personal injury judgment."

Dr. Isern raised various constitutional questions in his petition for mandamus to the Supreme Court. (Dr. Isern's Pet. 17, violates his due process, equal protection and access to the courts, if the code conflicts with the rule, then it is unconstitutional) In fact, the identical constitutional issues raised herein by the Watsons were raised under Point 3 of Dr. Isern's petition for mandamus:

"ALTERNATIVELY, IF THE REMEDIES CODE CONFLICTS WITH TRAP 47(b)(1) TO PRECLUDE ALTERNATIVE SECURITY IN PERSONAL INJURY CASES, THEN IT IS UNCONSTITUTIONAL." (Pet.Mand. 39)

Watsons's responsive brief in the state court "joined issue" on the identical constitutional questions raised in this Court:

"RESPONDENTS' REPLY TO POINT THREE. Chapter 52 of the Remedies Code is not unconstitutional because it conflicts with Tex.R. App.P. 47(b)(1). While the Supreme Court can pass upon the 'constitutionality' of any legislative act, it cannot set up rules to create a constitutional issue." (Brief 37-39)

Only when the Texas Supreme Court decided that "court rules prevail over legislative statutes" as to suspending execution on personal injury judgments did it become necessary for Petitioners to assert a violation of **their** Constitutional rights. In the Watsons' motion for rehearing they asserted a violation of their federal Constitutional rights (M.Reh. 3, 4, 6-7, 9, 12-13, 15-16, 19-20, 28-31, 43). In Watsons' Second Motion to Supplement their Brief, they asserted the Texas Supreme Court had violated their constitutional rights under the 14th Amend., U.S. Const., to due process of law and equal protection of the law, and that the holding the court rule "trumped" the statute constituted a violation of the Court's separation of powers under the state and federal Constitutions. (Supp.Br. 4-5)

The case is final for purposes of review by this Court because the judgment of the Texas Supreme Court destroyed Petitioners' right to a constitutional "statutory full supersedeas bond to suspend execution on the judgment pending appeal." **Rosenblatt v. American Cyanamid Co.**, 86 S.Ct. 1 (1965). The issue of "finality" is not whether the judgment is "final on its face," but whether the Court "adjudicated federal rights so that they are not subject to further review in the state courts, and there are policy factors that warrant Supreme Court review." **Cox Broadcasting Corp. v. Cohn**, 95 S.Ct. 1029 (1975). As expressed in **Nebraska Press Association v. Stuart**, 96 S.Ct. 251 (1975),

the denial of Watsons' right to a execution in absence of a full statutory supersedeas bond falls within this Court's holding that "delay in itself is a final decision."

This case affects federal court judgments in Texas. Rule 69(a), F.R.C.P., provides that execution upon a money judgment is "governed by state law" in which the federal court sits. **Southern Pacific Transp. Co. v. San Antonio, Tex. by and through City Public Service Bd.**, 748 F.2d 266 (5th Cir., Tex. 1984); **Weir v. U.S.**, 339 F.2d 82 (C.A.Ark. 1964); and **Schram v. Spivack**, 68 F.Supp. 451 (D.C.Mich. 1946). Moreover, the importance of this denial of the Watsons' "statutory right to a full supersedeas to suspend execution" raises questions which affect the laws of all states.

CONSTITUTIONAL AND STATUTORY LAW

Texas statutes and rules both provide for execution upon a judgment during the appeal of a case where the losing party fails to file security or a bond to cover "the amount of the judgment, costs of court, and interest." That part of Texas law is not at issue in this petition.

Chapter 52, Texas Civil Remedies and Practice Code:

"§ 52.002 **Bond or Deposit for Money Judgment**

A trial court rendering a judgment that awards recovery of a sum of money, other than a judgment rendered in a bond forfeiture proceeding, a personal injury or wrongful death action, a claim covered by liability insurance, or a workers' compensation claim, may set the security in an amount less than the amount of the judgment, interest, and costs of the court, after notice to all parties and a hearing, finds that setting the security at an amount equal to the amount of the judgment, interest, and costs would cause irreparable harm

to the judgment debtor; and setting the security at the lesser amount would not substantially decrease the degree to which a judgment creditor's recovery under the judgment would be secured after the exhaustion of all appellate remedies."

"§ 52.005. **Conflict With Texas Rules of Appellate Procedure**

(a) To the extent that this chapter conflicts with the Texas Rules of Appellate Procedure, this chapter controls.

(b) Notwithstanding Section 22.004, Government Code, the supreme court may not adopt rules in conflict with this chapter."

Rule 47(b), Texas Rules of Appellate Procedure:

"(b) Money Judgment. When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest and costs. The trial court may make an order of provide for security in an amount or type deviating from this general rule if after notice to all parties and a hearing the trial court finds:

(1) as to civil judgments rendered...in a personal injury or wrongful death action, that posting the amount of the bond or deposit will cause irreparable harm to the judgment debtor, and not posting such bond or deposit will cause no substantial harm to the judgment creditor. In such a case, the trial court may stay enforcement of the judgment based upon an order which adequately protects the judgment creditor against any loss or damage occasioned by the appeal;

(2) as to civil judgments rendered other than in...a personal injury or wrongful death action, that posting the security at an amount of the judgment, interest, and costs would cause irreparable harm to the judgment debtor, and ordering the

security at a lesser amount would not substantially decrease the degree to which judgment creditor's recovery under the judgment would be secured after the exhaustion of all appellate remedies."

Amendment 14, § 1, Constitution of United States:

" No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Art. 1, § 3, Bill of Rights, Texas Constitution:

"All free men... have equal rights, and no man, or set of men, is entitled to exclusive public emoluments, or privileges, but in consideration of public services."

Art. 1, § 13, Bill of Rights, Texas Constitution:

"... All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."

Art. 1, § 19, Bill of Rights, Texas Constitution, 1876:

"No citizen of this State shall be deprived of life, liberty, property, or privileges or immunities,...except by the due course of the law of the land."

Art. 1, § 28, Bill of Rights, Texas Constitution, 1876:

"No power of suspending laws in the State shall be exercised except by the Legislature."

STATEMENT OF THE CASE

The Texas Supreme Court's holding that the statute does not "conflict" with its rule is an intentional, deliberate and devious **DISTORTION** of the English language. Only by a "slight of hand" can the court interpret § 52.002 of Chapter 52 of the Code as permitting a reduced supersedeas bond to suspend execution on a personal injury judgment. The statute cannot be manipulated in such manner because its language is clear, unambiguous, and to the point: "other than in a personal injury judgment, a trial court may set security in an amount less than the judgment."

The Court violated Art. 1, § 28, Tex.Const., which vests in the Legislature the exclusive power to suspend laws of the State. The Court exceeded its constitutional powers and "usurped" Legislative constitutional powers to determine the State's "public policy" relating to suspension of judgments pending an appeal. It is settled law that a court rule must "yield" to a contrary statute.

This case presents "serious, substantial, and reoccurring" constitutional issues of great importance to the citizens of Texas, executions upon federal judgments in Texas, and the execution and supersedeas laws of other states, and a strong constitutional question addressing the "separation of powers" between the Legislature and Judiciary. For example, the holding conflicts with federal law as determined by **Allen v. David**, 334 F.2d 592 (5th Cir. 1964), in holding that a court cannot "rewrite statutes" to create a remedy where none exists under the statutes.

Mrs. Watson suffered an amputation of her leg due to the delay in treatment of a ruptured popliteal artery as a proximate cause of Dr. Isern's "misdiagnosis" of her injury on April 1, 1982 **(over 14 years ago)**. Based upon a jury verdict, the trial court entered judgment on July 7, 1995,

against Dr. Isern awarding Mrs. Watson $3,091,495.43 and Rix Watson $17,873.81 (which included prejudgment interest under state law) and unpaid court costs ($1,122.80), plus "postjudgment" interest from date at 10% per annum. **The reduced $500,000 security bond is less than 1/6th of the judgment ($3,104,492.04), and does not provide any sum as security for postjudgment interest pending the appeal. Postjudgment interest in one year raised the judgment to $3,414,941.24 as of July 7, 1996.**

Postjudgment interest accrues at $28,457.84 per month after July 7, 1996. Therefore, as of October 7, 1996, postjudgment interest alone on the judgment amounts to $395,822.87. The case is not presently set for oral argument in the Court of Appeals; therefore, assuming only a two year "appellate delay" (7/7/95 to 7/7/97), postjudgment interest alone amounts to $651,943.32, almost $152,000 more than the reduced supersedeas bond, and without any security whatsoever for the $3.1 million primary judgment.

Insurance Corporation of America, referred to as "ICA" herein, refused to post a supersedeas bond while appealing the judgment, the insurer incorrectly asserting that its liability under Dr. Isern's policy is limited to the $500,000 face-amount of its policy in spite of specific contractual obligations to pay court costs and "**all costs of bonds, in addition to and irrespective of the policy limits.**" That assertion also **ignored** the statutory law of Texas requiring payment of prejudgment and postjudgment interest on an award of damages. After the Watsons obtained an execution on the judgment, Dr. Isern and ICA, as a party at interest, filed a motion in the trial court to permit a reduced supersedeas bond of only $500,000 to suspend the execution pending the appeal. The trial court granted the motion, but the Ninth Court of Appeals of Texas reversed. Dr. Isern then filed a petition for mandamus in the

Supreme Court of Texas. In a "per curiam" opinion, the Supreme Court set aside the order of the Ninth Court of Appeals and affirmed the trial court's order granting a reduced supersedeas.

Per the non-audited financial statement of Dr. Isern filed in the trial court, his net worth was $1,106,200 [doubled for one-half community net worth as stated]. Dr. Isern's community interest included $4,000 in cash, $400,000 in retirement benefits, $177,200 in nonmarketable securities, $10,000 in marketable securities, $180,000 in real estate [excluding homestead], and an unevaluated interest in a medical partnership. Yet, he was not required to post even one cent in security to avoid execution on the judgment. Except as to the "unsupported" pleading the Watsons are "better off with $500,000 than nothing, which is what bankruptcy will get them," neither Dr. Isern nor ICA offered any evidence that a reduced supersedeas bond would not harm the Watsons. If Dr. Isern filed bankruptcy as he threatened, he would be limited to Chapter 7 bankruptcy and the Watsons could assert their debts are "nondischargeable" based upon his "willful and malicious" acts, conduct and omissions in the diagnosis and treatment of Mrs. Watson. Also, Dr. Isern's pending suit against ICA for "bad-faith claim practices" would become property of the bankruptcy estate. The "hard facts of life" are that at the Watson's ages, they are better off getting this case behind them if it is in God's plan that Dr. Isern will be permitted to discharge any part of their judgment debt in bankruptcy which is not covered by ICA's policy, Isern's damage suit against ICA , and Isern's non-exempt assets.

The legislative history of Chapter 52 reflects the following statements of Senator Carl Parker, the author of Chapter 52, as to the **"intent of the people"** to preclude a court from ordering a reduced supersedeas bond to suspend personal injury judgments:

"The main thing this is getting at is large business-type contract disputes and business torts. **It is not intended to have people who were injured, widows waiting forever, with no security for their judgments.** And there is no reason for waiting if they have a third party guarantor for the judgment.

The principal amendment, there were three amendments, two of them were purely technical amendments to make sure the Bill did what it said it would do. **The third amendment clarified and made certain that certain judgments such as personal injury judgements, worker comp judgments, judgments basically that are secured by a third party guarantor like an insurance company, are not covered in this Bill and makes it apply principally to large commercial disputes."** [emphasis added]

Senator Parker's **affidavit**, filed with the Supreme Court on Petitioners' motion for rehearing, states:

"Section 52.005 of the Texas Civil Practice & Remedies Code, effective September 1, 1989, was further enacted by the legislature to **prevent the Supreme Court of Texas from enacting or promulgating any rule of appellate procedure which would permit a trial court or appellate court to order a reduced supersedeas to suspend execution of a personal injury judgment on appeal.**

"Chapter 52, as enacted by the legislature clarified and made certain that personal injury judgments and wrongful death judgments were not subject to any rule of appellate procedure by the supreme court which permitted a reduced supersedeas. **The act of the legislature controls over the authority of the supreme court to promulgate any appellate rule contrary to the statute."**[emphasis added]

In setting aside the judgment of the Court of Appeals, the Supreme Court "usurped" the Legislature's state and federal Constitutional "separation of powers." The illegal, novel, and unprecedented holding that a court rule "trumps" a statute violates the very foundation of federal and state constitutional law, and has "far reaching legal consequences" in permitting a court to "rewrite" a statute because it does not fit the court's liking.

ARGUMENT

1. This Court should resolve the constitutional attack upon the right of the Texas court to "override" or "trump" a statute which forbids a reduced supersedeas bond to suspend a personal injury money judgment.

The supersedeas law of Texas was considered by this Court in the notorious $10.53 billion verdict in Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1986). Although this Court held it was bound by the "federal court abstention policy" based upon **Younger v. Harris**, 401 U.S. 37, the opinions of several Justices of this Court discussed the constitutionality of the laws of Texas relating to supersedeas of money judgments, which are applicable to this case.

This Court's concern that Texaco elected not to present any constitutional claims in the state court is **not applicable to this case as the constitutional questions were presented to the Texas Supreme Court and overruled.** Interestingly, this Court concluded that the Texas "open courts" provisions (Art. 1, §13, Tex. Const.) might have avoided a federal constitutional ground if Texaco had raised the complaint in the Texas Supreme Court. Justice Stevens noted that Texaco's harm exists by the mere financial size basis of the company, but that it is not different from other

defeated litigants, and that "our duty to deal equally with the rich and poor does not admit of a special exemption for multimillion-dollar corporations or transactions." Justice Stevens noted, at page 33 of the Opinion:

> "It is clear that the States' strong concern for protecting appellees' right to recover on judgments amply justifies the bond or security requirements that are currently so prevalent across the county."

Justice Stevens also noted that part of any states "public concern" for a full supersedeas bond is the possibility that the debtor may purposely dissipate its assets, or that subsequent creditors may attach the debtor's property. The Texas Legislature clearly considered these same policy considerations in enacting Chapter 52 of the Code.

Justice Marshall stated the case should not have been in the federal courts at all because Texaco did not raise constitutional issues in the state court; however, he stated in consideration of Texaco's "equal protection of the law" constitutional complaint:

> "Had the sole proprietor of a small Texas grocery sued in the Southern District of New York to enjoin the enforcement of the Texas bonding provision to facilitate appeal in Texas from a state-court judgment in the amount of $10,000, the result below would surely have been different, even if inability to meet the bonding requirement and to stay execution of judgment meant dissolution of the business and displacement of employees. The principles which would have governed with $10,000 at stake should also govern when thousands have become billions. That is the essence of equal justice under the law."

The "state action" reviewable as a violation of the 14th Amendment includes both legislative and judicial interpretations. **Wheeling Steel Corp. v. Glander**, 337 U.S. 562, 69 S.Ct. 1291 (1949). "Due process" requires that state action be consistent with fundamental principles of justice which are the basis of civil trial rights, usually termed the "law of the land." **Buchalter v. People of State of New York**, 63 S.Ct. 1129, 319 U.S. 427 (1943). In short, the 14th Amendment "protects a citizen from the state itself and all of its creatures." **West Virginia State Board of Education v. Burnette,** 63 S.Ct. 1178, 319 U.S. 624 (1943) Therefore, where the legislative purpose is plain from a reading of a statute, the Supreme Court cannot assume to do what the Legislature has refused to do, and when it appears the legislative act is relevant, appropriate, and consistent with the limitations of the Constitution, the judiciary inquiry ends. It is for Congress, not the courts, to write the law. **Stanard v. Olesen**, 74 S.Ct. 768 (1954); **Southern S.S. Co. v. N.L.R.B.**, 62 S.Ct. 886, 316 U.S. 31 (1942). There is a "strong presumption of the constitutionality of a statute, and every possible presumption in favor of its constitutionality exists until overcome beyond a reasonable doubt." **Goldblatt v. Town of Hempstead, N.Y.**, 82 S.Ct. 987, 369 U.S. 590 (1962).

Executions on Federal court judgments in Texas are affected by the holdings in this case. Rule 69(a), F.R.C.P., provides that execution upon a money judgment is "governed by state law" in which the federal court sits. **Southern Pacific Transp. Co. v. San Antonio, Tex. by and through City Public Service Bd.**, 748 F.2d 266 (5th Cir., Tex. 1984); **Weir v. U.S.**, 339 F.2d 82 (C.A.Ark. 1964); and **Schram v. Spivack**, 68 F.Supp. 451 (D.C.Mich. 1946).

2. **There is a constitutionally protected right to an execution on a judgment in the absence of a statutory supersedeas bond.**

In absence of a "statutory supersedeas bond," a judgment creditor has a constitutional right to execution to enforce the judgment. **Anderson v. Lykes**, 761 S.W.2d 831 (Tex.App.-Dallas 1988). In **Lovelace v. Sabine Consolidated, Inc.**, 733 S.W.2d 648, 657 (Tex.App.-Houston [14th Dist.] 1987, writ denied), the debtor argued that the requirement of a full supersedeas bond was unconstitutional because he was "not financially able to post a full supersedeas bond." In affirming, the court said:

> "Appellant has had his day in court. By due process of law an amount has been adjudged to be owed to Sabine. It does not violate the Constitution of this State for our courts to protect that judgment. It is, in fact, consistent with our Constitution that the successful litigant's right to property should be afforded due protection by the courts that determined that property right. We, therefore, hold that Rule 47 of the Texas Rules of Appellate Procedure is not unconstitutional as applied. The trial court did not err in refusing to reduce the supersedeas bond or to stay execution."

Nin Bryan v. Luhning, 106 S.W. 2d 403 (Tex.App.-Galveston 1937), recognized this public policy of Texas:

> "The right to suspend a judgment pending appeal applies to all judgments in civil cases...in brief, the Legislature has conferred a statutory right on the party obtaining judgment to have execution issued thereon pending appeal, unless and until the judgment debtor files a proper supersedeas bond. The fact that

> a judgment-debtor is financially unable to file such bond cannot destroy this statutory right."

Therefore, since the statute permits enforcement of a judgment in absence of a statutory supersedeas bond to stay an execution, this Court must decide whether Chapter 52, Remedies Code, is constitutional. If it is, the Supreme Court was wrong in affirming a reduced supersedeas bond. Secondly, **since there is a clear conflict between the statute and the rule, based upon the common meaning of words in the English language**, the Supreme Court erred in holding that its rule was not required to "yield to the statute."

3. **Court rules in conflict with statutes must "yield" to the statute. Courts have no constitutional power to "rewrite" a statute.**

The Supreme Court violated settled law as expressed by its own opinion in Mills v. Bagby, 4 Tex. 320 (1849):

> **"Where a rule of procedure established pursuant to power vested in the supreme court conflicts with a legislative enactment, the rule must yield."**

This same law exists in all states and is reinforced by this Court's decisions in such cases as **City of New Orleans v. Dukes**, 96 S.Ct. 2513, on remand 537 F.2d 856. The right to suspend execution on a judgment involves laws entrusted to the Legislature, and not to the judiciary. **Spark v. Lasater**, 232 S.W. 346 (Tex.App.-San Antonio 1921), addressing prior Texas statute art. 2101 requiring a supersedeas bond in a sum "at least **double** the amount of the judgment, interest, and costs," held the statute was constitutional and **the court could not "usurp" legislative powers**:

"The remedy for the prevention of the issuance of an execution....during the pendency of an appeal, and the

inability of an appellant to give such a bond would present no ground for the issuance of an injunction from an appellate court to protect its jurisdiction. If such a rule were established, the article in question might become a dead letter, and injunctions take the place of supersedeas bonds, on the affidavits of appellants that they were too poor to give a supersedeas bond.

If it had been deemed just and proper that judgments should be suspended by such an affidavit, provision would have been made for the granting of such suspension on a pauper's oath, as well as for appeals in the case of cost bonds. The law has made the concession to the poor to appeal upon proof of inability to give a cost bond; but it does not provide for suspension of execution of a judgment upon such affidavit and proof, and **no such law will be put in effect by attempted judicial usurpation of legislative prerogatives by an appellate court, in the name and under the guise of preservation of jurisdiction. That appellants are too poor to give a supersedeas bond is their misfortune, but cannot be made the basis for the destruction of a statute, and the assumption of powers not accorded the judiciary**." [emphasis added]

Therefore, however harsh or limited a statute might appear, the courts cannot rewrite laws enacted by the Legislature or strike down a law merely because the judiciary might consider it unjust or unwise -- the Court's prerogative is limited to interpreting statutes in light of their constitutional framework as enacted by the Legislature. **National R. R. Passenger Corp. v. National Ass'n of R. R. Passengers**, 94 S.Ct. 690, 414 U.S. 453, reh. den. 94 S.Ct. 1478, 415 U.S. 952. **Skrabanek v. Ritter**, 412 S.W.2d 337 (Tex.App.-Austin 1967, ref.n.r.e.), states "it is the duty of the Courts to administer laws as they are found and not to make laws. To do otherwise is to assume

functions that pertain solely to the legislature." **The Texas Supreme Court cannot sit as a "super Legislature to judge the wisdom or desirability of public policy considerations," or to "create a statutory exception when Congress has declined to do so." Freytag v. C.I.R.**, 111 S.Ct. 2631 (1991); **Jones v. Del Andersen and Associates**, 549 S.W.2d 348 (Tex. 1976); **Lee v. City of Houston**, 807 S.W.2d 290 (Tex. 1991), **Jones v. Liberty Mut. Ins. Co.**, 745 S.W.2d 901 (Tex. 1988); and Art. 2, § 1, Tex. Const. Courts are bound by the state's "public policy" as declared by the Legislature in statutes, and have no power to legislate. **James v. Strange, 92 S.Ct. 2027 (1972)**, and **Texas Public Bldg. Authority v. Mattox**, 686 S.W.2d 924 (Tex. 1985).

Galveston, H. & S.A.Ry. Co. v. Stewart & Treadgill, 257 S.W. 526 (Tex.Com.App. 1924), holding a court rule was unconstitutional which deprived a litigant of findings of fact under statutes, stated:

> "The statute gives the appellant the right to have the trial judge file his findings of fact and conclusions of law, and a court rule depriving him of that right is contrary to the Constitution of our state."

No rule of a court can repeal a plain statutory requirement. **Duval County Ranch Co. v. Drought**, 260 S.W. 298 (Tex.App.-San Antonio 1924).

The Texas Supreme Court **ignored** its own case law in **Few v. Charter Oak Fire Ins. Co.**, 463 S.W.2d 424, 425 (Tex. 1971), which discussed court Rule 39 versus Articles 4621 and 4626 of the Family Code as to whether the husband is an indispensable party to the wife's workman's compensation claim, where it stated:

> "If only Rule 39 were involved in the case before us, our decision would be controlled by our earlier decision in Petroleum Anchor. However, we are now faced with two relevant statutes enacted by the legislature. Article V, Sec. 25, of the Texas Constitution, Vernon's Ann.St. vests in the Supreme Court the power to establish rules of procedure 'not inconsistent with the law of Texas.' Legislative authority for this power is found in Article 1731a, Sec. 2. Rule 39 was established pursuant to this power. **As the constitution provision indicates, this is a limited power; and when a rule of the court conflicts with a legislative enactment, the rule must yield.**" [emphasis added]

4. **The Supreme Court "usurped" the Legislature's power relating to supersedeas of a judgment.**

The Court "usurped" constitutional powers entrusted to the Legislature in violation of Art. 1, § 28, Tex. Const.:

> "The Supreme Court shall have power to make and establish rules of procedures, **not inconsistent with the laws of the state,** for the government of said court and the other courts of the state to expedite the dispatch of business therein."

Chapter 52, Texas Remedies Code, clearly forbids the courts to order a "reduced supersedeas bond in case of a personal injury money judgment," and specifically forbids the Supreme Court to make any appellate rules to the contrary. The following statutes are clear and unambiguous:

"§ 52.002. **Bond or deposit for Money Judgment**

A trial court rendering a judgment that awards recovery of a sum of money, **other than a judgment rendered in**

a...personal injury case..., may set the security in a amount less than the amount of the judgment..."

"§ 52.005. **Conflict With Texas Rules of Appellate Procedure**

(a) To the extent that this chapter conflicts with the Texas Rules of Appellate Procedure, this chapter controls.

(b) Notwithstanding Section 22.004, Government Code, the supreme court may not adopt rules in conflict with this chapter.

CONTRARY TO THE OPINION OF THE SUPREME COURT, the statutes conflict with Appellate Rule 47(b)(1). The statute, in plain English language, states "Other than a personal injury judgment, a court may order a reduced supersedeas bond."

The Texas Legislature has full control over the mode, time and manner of prosecuting suits, including the power and exclusive right to mandate rules of evidence and procedure. **Coffey v. Young**, 704 S.W.2d 591 (Tex.App.-Fort Worth 1986), and **Jackson v. State**, 861 S.W.2d 259 (Tex.App.-Dallas 1993). The Legislature is entitled to expect the judiciary to faithfully follow the specific text in statutes. **Boykin v. State**, 818 S.W. 2d 782 (Cr.App. 1991).

The Texas Constitution entrusts to the Legislature the power "to enact the laws which are of general public concern, and the legislature as a general rule cannot delegate the power of making laws to the courts or any other body." **Green v. City of Amarillo**, 244 S.W. 241 (Tex. App.-Amarillo 1922). However, Texas statutes such as RS Art. 1731a reflect the Legislature has from time to time relinquished to the Supreme Court the power of "rule-

making" for trial and appellate procedures; however, as a check-rein, the Legislature reserved the right to disapprove any rule made by the Court. **Bar Ass'n of Dallas v. Hexter Title & Abstract Co.**, 175 S.W.2d 108 (Tex.App.-Ft. Worth, 1943, affd. 179 S.W.2d 946). Only matters of practice and procedure are included in the statute conferring rule-making powers on the Supreme Court, and the Court does not have the power to establish "public policy" regarding executions and supersedeas relating to judgment, that power is entrusted to the Legislature under the State Constitution. **Mortiz v. Byerly**, 185 S.W.2d 589 (Tex.App.-Austin 1945, error refused). **Harrison v. Barngrover**, 72 S.W.2d 967, 969 (Tex.App.-Beaumont 1934), cert. den. 294 U.S. 731, 55 S.Ct. 639, in dissolving an injunction against execution on a judgment, held in reference to arts. 2270 and 2275:

> It is settled by our Supreme Court that the execution of a final judgment in every civil case appealed, pending the appeal, can be suspended only by the execution of a supersedeas bond by the appellant. There is no exception."

Haney Elec. Co. v. Hurst, 608 S.W.2d 355 (Tex.App-Dallas, 1980); **Cooper v. Bowser**, 583 S.W. 2d 804 (Tex. App.-San Antonio, 1979); and **Harrison v. Barngrover**, 72 S.W. 2d 967 (Tex.App.-Beaumont, 1934). In **Dallas Bank & Trust Co. v. Thompson**, 78 S.W. 2d 749 (Tex.App.-Dallas 1935), the Court held that the supersedeas statute provides a "complete provisional remedy at law" under the constitution, and that the judgment-debtor was not entitled to an injunction to prevent execution.

The word "shall" in legislative laws has a clear mandatory connotation, and the court's rule-making power is exercisable only in a manner not inconsistent with the law of

the state, and when a rule of court conflicts with a legislative enactment, the rule must yield. Art. 5, §25, Tex.Const; **Crickmer v. King**, 507 S.W.2d 314 (Tex.App.-Texarkana 1974); and **In Pistole v. State**, 150 S.W. 618 (Tex.Crim.App. 1912). Therefore, the Rules of Appellate Procedure as promulgated by the Supreme Court are subject to legislative veto. Thus, when a rule conflicts with a statute, the rule must fall. **Southwest Metal Fabricators, Inc. v. Internacional de Aceros, S.A.**, 503 F.Supp. 76 (D.C Tex. 1980), and **Few v. Charter Oak Fire Ins. Co.**, 463 S.W.2d 424 (Tex. 1971) Tex.Const. art. 5, §25. **Crickmer v. King**, 507 S.W.2d 314 (Tex.App.-Texarkana 1974, no writ), and **Picard v. State**, 631 S.W.2d 761 (Tex.App.-Beaumont 1981), state:

> "The Court's rule-making power is exercisable only in a manner not inconsistent with the law of the state. When a rule of court conflicts with a legislative enactment, the rule must yield."

Courts cannot "rewrite" statutes in order to create a remedy where none has previously been held to exist. **Allen v. David**, 334 F.2d 592 (5th Cir. 1964, cert. den. 85 S.Ct. 660, 379 U.S. 967, 13 L.Ed.2d 560); **Tijerina v. City of Tyler**, 846 S.W.2d 825 (Tex. 1992), **Jones v. Liberty Mut. Ins. Co.**, 745 S.W.2d 901 (Tex. 1988). and **Castillo v. Canales**, 174 S.W.2d 251 (Tex. 1943). **De Leon v. Owen**, 3 Tex.Rpt. 153 (Tex. 1848), in discussing a statute limiting the "time to file a transcript", stated:

> "These legislative rules are certainly very stringent, but there is no ambiguity in them; the most liberal provision, and indeed the only one that seems to allow any discretion is that the record, if filed within thirty days, can be sustained on the docket if cause sufficient, in the opinion of the court, is shown why

it was not filed in due time. **Legislative rules are inflexible, and when explicit and clearly understood, they must be enforced without regard to the individual injury that may be the result**." [emphasis added]

5. **The Supreme Court has misstated the mandates of Chapter 52 of the Code to "justify" its violation of the statute which forbids a reduced supersedeas bond in personal injury cases and forbids the Court from enforcing any rule in conflict.**

In attempting to "justify" its violation of its powers under the State Constitution, the Texas Supreme Court **erroneously** holds that **both** Chapter 52 and Rule 47(b)(1) provide that the trial court may order alternative security in personal injury cases. **The wording of Chapter 52 does not permit such legal conclusion.** The Supreme Court has intentionally distorted the English language in holding that **"On its face, section 52.002 does not prohibit alternative security in appeals from personal injury judgments; rather, it simply addresses alternative security for appeals in cases other than those involving personal injury."**

In Alice in Wonderland the Mad Hatter stated, "I have no trouble defining words, words mean what I say they mean." Here, somewhat like the Mad Hatter, the Supreme Court had "adopted its own definition of words in the English language," as evidenced by wording of Chapter 52 which permits a reduced supersedeas bond **ONLY IN CASES "OTHER THAN A JUDGMENT RENDERED IN A PERSONAL INJURY OR WRONGFUL DEATH CASE."** The words "other than" are words commonly understood to mean to "exclude," "not included," "not related to," and "otherwise." "Other; otherwise" is defined as "one that remains of two or more" or "a thing opposite to

or excluded by something else." **Webster's Ninth New Collegiate Dictionary.**

In discussing the word "testimony" in a statute, **Bingham v. State**, 915 S.W.2d 9 (Tr.Cr.App.1944), stated: "Because all words, phrases and terms used in the Code of Criminal Procedure are to be taken and understood in their usual acceptation in common language, except where specifically defined, courts should not be involved in the business of redefining words used in an ordinary sense by the Texas Legislature. (code cites) Rather, when read in context, such words should be open to the broadest possible understanding in which they are reasonably susceptible in the English language. "**Ex parte Halsted**, 182 S.W.2d 479 (Tex.Cr.App. 1944), stated the following rule in constructing a statute:

> "Express mention of one thing in statutes is tantamount to exclusion of all others. Affirmative words in statute imply negative of what is not affirmative, and negative words thereby imply affirmative of what is not negative."

The Texas Supreme Court is bound by Chapter 52 based upon the Court's own opinions in **Calvert v. Texas Pipe Line Co.**, 517 S.W.2d 777 (Tex. 1974), and **Railroad Commission of Texas v. Miller**, 434 S.W.2d 670 (Tex. 1968), holding: "The intention of the Legislature is to be found in the language of the statute itself."

6. Chapter 52 of the Code mandates a "full supersedeas bond" under Texas law, regardless of ICA's "alleged" limited liability.

The Watsons' right to execution can be suspended only by a compliance with Chapter 52 of the Code. At a

minimum, the bond must secure "the full amount of the judgment (including prejudgment interest), costs, and postjudgment interest for one year." **Gullo-Haas Toyota v. Davidson, Eagleson**, 832 S.W.2d 418 (Tex.App.-Houston [1st Dist.] 1992). "Postjudgment interest is mandated by statute, and is recoverable whether or not specifically awarded in the judgment." **Staff Industries, Inc. v. Hallmark Contracting, Inc.**, 846 S.W.2d 542 (Tex.App.-Corpus Christi 1993, no writ).

In accepting ICA's claims that its liability was limited to $500,000 based upon its stated "policy amount" and that ICA was in "potential receivership, and the Watsons would end up with nothing but a bankrupt judgment-debtor," which would also be prejudicial to Dr. Isern, if the Court refused Dr. Isern's motion for a reduced supersedeas bond, the trial court and Supreme Court ignored well-established Texas law as to insurance contracts. **Potomac Ins. Co. v. Howard**, 813 S.W.2d 557 (Tex.App.-Houston [14th Dist.] 1991, no writ), involved a claim based upon stipulated policy limits of $45,000 in an uninsured motorist dispute, and the court held the insurer was liable in excess of policy limits based upon the following considerations of the "public policy of Texas":

> "The primary object of damages is to compensate the victim, and if the victim is paid only the damages awarded, he is not fully compensated since he has been denied the opportunity to invest and earn interest on the damages between the time of the occurrence and the time of judgment."
>
> "Prejudgment interest encourages speedy compensation of victims and insures that a defendant and his insurance company will not benefit by any strategy of delaying payment of damages to the victim."

> "Nowhere is that objective more frustrated than in a case of damage limitation in an insurance policy. If the insurance company is required to pay only the policy limits even if the insured must sue to recover under the policy, the insurance company has no incentive to pay the claim promptly."

Owens-Illinois, Inc. v. Estate of Burt, 897 S.W.2d 765 (Tex. 1995), and **Coastal Iron Works, Inc. v. Petty Ray, Geophysical**, 783 F.2d 557 (5th Cir. 1986), also involve Texas law holding insurers liable for prejudgment and postjudgment interest in excess of policy limits.

A large majority of states now subscribe to the same public policy consideration, and hold that "statutory interest" is an essential equitable consideration to prevent insurance companies from working a "fraud" upon the insured who has no control over settlements and litigations tactics to delay payment of just claims, "especially if the there is a low limits policy and a major-damage injury suit." **Thomas v. Liberty National Ins. Co.**, 368 So.2d 254 (Ala. Sup.Ct. 1979), and **Burford Equipment Co., Inc. v. Centennial Ins. Co.**, 857 F.Supp. 1499 (M.D.Ala. 1994), hold that statutory prejudgment interest is "automatically a part of the insurance contract as a matter of law, regardless of the provisions of the policy." In **Matich v. Modern Research Corp.**, 420 N.W.2d 67 (Mich.Sup.Ct. 1988), the court held:

> "Payment of prejudgment interest not only compensates the prevailing party but also liability for prejudgment interest may act as an incentive to the insurer to promptly settle a meritorious claim. Without such an incentive, the insurer may refuse to settle a meritorious claim in hopes of forcing the plaintiff to settle for less than the claim's true value. The insurer risks nothing. Even if protracted litigation

> results, the insurer will only be liable for its policy limits---all the while reaping a tidy sum from its investment of the policy limits. It seems fair to **compel the insurer to pay all the interest that accrues pending an appeal**, even though the judgment is in excess of the policy limits, for the reason that the insured might desire to pay the excess judgment and thus prevent the running of interest, but the insurer's control of the litigation would prevent him from doing so."

Cox v. Peerless Ins. Co., 774 F.Supp. 83 (D. Conn. 1991), noting that Connecticut's statutes provide for prejudgment interest to encourage settlements (**as Texas does**), states:

> "To allow the insurer total control over all pre-trial settlement negotiations, and ultimately tax the insured for the insurer's decision not to settle the case within the insured's liability limit would discourage settlement, and would be in opposition to the statutory goal of prejudgment interest awards."

Therefore, even if there was a valid argument that ICA should be required to fund a supersedeas bond based upon its face-policy amount, **which there is not**, the Supreme Court and trial court failed to require ICA to fund prejudgment and postjudgment interest on what it claims to be its policy limit, a denial of due process.

PRAYER

WHEREFORE, the real parties at interest, HELEN AND RIX WATSON, pray that their Petition for a Writ of Certiorari be granted and the judgment of the Supreme Court of Texas be reversed and judgment of the Ninth Court of

Appeals be affirmed, that Petitioners recover their costs of court, and that they have such other relief in law and in equity to which they are justly entitled.

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APPENDIX A

THE SUPREME COURT OF TEXAS

No. 96-0330

REUBEN A. ISERN, M.D., RELATOR

v.

THE NINTH COURT OF APPEALS, RESPONDENT

On Petition for Writ of Mandamus

PER CURIAM

This mandamus action questions whether Rule 47(b)(1) of the Texas Rules of Appellate Procedure and section 52.002 of the Texas Civil Practice and Remedies Code conflict and, thus, preclude a trial court from allowing alternate security in appeals from personal injury judgments. We conclude that these provisions do not conflict. Therefore, the trial court did not abuse it discretion by allowing Dr. Reuben A. Isern to post alternate security in the present case. We also conclude that Isern has no adequate remedy by appeal. Accordingly, we grant leave to file and conditionally grant the writ of mandamus. TEX. R. APP. P. 122.

Isern is a defendant in a medical malpractice lawsuit. The jury rendered a verdict for the plaintiffs, the real parties in interest in this proceeding, in excess of $3.1 million. The limits of Isern's liability policy are $500,000. Accordingly,

his insurance carrier, Insurance Corporation of America (ICA), will only post a $500,000 supersedeas bond. Alleging he could not post the full $3.1 million security himself, Isern filed a motion with the trial court seeking to use alternate security to supersede execution on the judgment. The trial court granted the motion and ordered Isern to post alternate security in the form of $500,000 in bonds offered by ICA. The plaintiffs appealed the trial court's order. TEX. R. APP. P. 49. The court of appeals set aside the trial court's order, holding that section 52.002 and 52.005 of the Texas Civil Practice and Remedies Code made "certain that judgments rendered in personal injury cases require[]a full supersedeas bond equal to the amount of the judgment, plus interest, plus costs."___S.W. 2d___,_ (quoting Laird v. King, 866 S.W. 2d 110, 115 (Tex.App.--Beaumont 1993, orig. proceeding)).

In mandamus proceedings, "[o]ur focus remains on the trial court's order regardless of the court of appeals' decision on mandamus. We make an independent inquiry whether the trial court's order is so arbitrary, unreasonable, or based upon so gross and prejudicial an error of law as to establish abuse of discretion." Johnson v. Fourth Court of Appeals, 700 S.W. 2d 916, 918 (Tex. 1985). Isern asserts that the court of appeals improperly disturbed the trial court's judgment by holding that a supersedeas bond equal to the whole amount of the judgment, plus interest and costs, must be post in personal injury actions. We agree.

The circumstances surrounding the adoption of Rule 47 and section 52.002, as well as the later amendments to Rule 47, illustrate that the rule and the statute do not conflict. In 1986, Rule 47 provided that the trial court could not allow alternate security in appeals from *money* judgments. TEX. R. APP. P. 47 (amended in 1986)(formerly TEX. R. CIV. P. 364). In the wake of

Texaco, Inc. v. Pennzoil Co., 729 S.W. 2d 768 (Tex.App.--Houston [1st Dist.] 1987, writ ref'd n.r.e.), *cert. dismissed*, 485 U.S. 994 (1988), the need for alternate security in appeals from money judgments became apparent. In 1988, this Court amended Rule 47 to allow alternate security in any appeal, including appeals for money judgments, provided the party seeking alternate security could prove that posting the full amount of the bond would cause irreparable harm to the judgment debtor and not posting the full bond would cause no substantial harm to the judgment creditor. TEX. R. APP. P. 47 (amended in 1988). One year later the Legislature promulgated Chapter 52 of the Texas Civil Practice and Remedies Code. Section 52.002 established a slightly different standard for alternate security than that provided in Rule 47. This section also applied to all appeals from money judgments "other than a judgment rendered in a ...personal injury or wrongful death action..." TEX. CIV. PRAC. & REM. CODE §52.002 (Supp. 1996). *Subsequently*, this Court again amended Rule 47, retaining the original standard for alternate security in appeals from personal injury judgments, but adopting section 52.002's standard for alternate security in appeals from other money judgments. TEX. R. APP. P. 47(b)(1)-(2)(amended in 1990). This Court's stated purpose for the 1990 amendment was to "conform the rule to statute." *Id.* cmt.

Presently, section 52.002 of the Texas Civil Practice and Remedies Code and Rule 47(b)() of the Texas Rules of Appellate Procedure provide that the trial court amy order alternate security in cases *other than personal injury cases* if (1) setting the security at an amount equal to the judgment would cause irreparable harm to the judgment debtor, and (2) setting the security at a lessor amount would not substantially decrease the judgment creditor's ability to recover after appeals are exhausted. TEX. CIV. PRAC. & REM. CODE § 52.002; TEX. R. APP. P. 47(b)(2). Supplementing those

provisions, Rule 47(b)(1) requires a bond for the full amount of the money judgment, but affords the trial court the discretion to reduce the amount of security in *personal injury* actions if the trial court finds that (1) posting the amount of the bond will cause irreparable harm to the judgment debtor; and (2) not posting the full bond will cause no substantial harm to the judgment creditor. TEX. R. APP. P. 47(b)(1). The plaintiffs argued, and the court of appeals agreed, that Rule 47(b)(1) conflicts with section 52.002.

While section 52.005 provides that to the extent there is any conflict with the Texas Rules of Appellate Procedure, the provisions in Chapter 52 of the Code control, TEX. CIV. PRAC. & REM. CODE § 52.005(a), we see no conflict between section 52.002 and Rule 47(b)(1). Moreover, section 52.005(c) provides that the "Texas Rules of Appellate Procedure apply to any proceeding, *cause of action*, or claim to which Section 52.002 does not apply." *Id.* § 52.005(c) (emphasis added). On its face, section 52.002 does not prohibit alternate security in appeals from personal injury judgments; rather, it simply addresses alternate security for appeals in cases other than those involving personal injury. Therefore, section 52.002 does not apply to appeals from personal injury judgments. Under Rule 47(b)(1), the trial court had discretion to set the supersedeas bond at a lessor amount in the present appeal from the personal injury judgment. Accordingly, we expressly disapprove of Laird v. King, 866 S.W. 2d 110 (Tex.App.--Beaumont 1993, orig. proceeding).

Concluding that the trial court had discretion under Rule 47(b)(1) to set alternate security in the present case, we next consider whether the trial court abused its discretion in doing so. In granting Isern's motion, the trial court found that: (1) the full supersedeas bond would be approximately $3.1 million; (2) ICA would only post a $500,000 bond; (3)

Isern had assets worth approximately $500,000, including a homestead worth $150,000; (4) Isern could not post the full $3.1 million bond; (5) if alternate security was not allowed, Isern would be forced to file bankruptcy; and (6) if Isern filed bankruptcy, the real parties would be left with a bankrupt judgment debtor and no posted security for any part of the judgment.

On this record, the trial court did not abuse its discretion by concluding that Isern would suffer irreparable harm if alternate security were denied or that the plaintiffs would not suffer substantial harm from posting alternate security. Accordingly, the court of appeals abused its discretion by disturbing the trial court's order. Johnson, 700 S.W. 2d at 917. We also hold that no adequate remedy by appeal exists because, absent immediate relief, Isern cannot supersede execution on the judgment pending the appeal. The threat of execution on the judgment is a situation of manifest and urgent necessity which renders any remedy by appeal inadequate. Walker v. Packer, 827 S.W. 2d 833, 840-43 (Tex. 1992)(no adequate remedy by appeal when party's ability to present viable claim is compromised).

Pursuant to Rule 11 of the Texas Rules of Appellate Procedure, without hearing oral argument, the Court grants leave to file and conditionally grants the writ of mandamus. TEX. R. APP. P. 122. Writ will issue only if the court of appeals fails to vacate its order on supersedeas of judgment.
Opinion Delivered: June 14, 1996

APPENDIX B
In the Court of Appeals
Ninth District of Texas at Beaumont

No. 09-95-34 CV

REUBEN A. ISERN, M.D., Appellant
V.
HELEN WATSON AND RIX WATSON, Appellees

On Appeal from the 60th District Court
Jefferson County, Texas
Trial Cause No. A-118347

OPINION ON SUPERSEDEAS OF JUDGMENT

This is a TEX.R.APP.P. 49 Motion to review the trial court order deviating from the supersedeas bond amount required to suspend the execution of a final judgment in a personal injury case.

This is a medical malpractice knee amputation case. A judgment was rendered on July 7, 1995, against appellant, Dr. Reuben A. Isern, awarding appellee, Helen Watson, $3,091,495.43 and Rix Watson $17,723.81, plus interest and court cost.

On November 17, 1995, the trial court granted Dr. Isern's TEX. R. APP. P. 47(b) Motion and ordered the supersedeas of the judgment to be reduced to the sum of $500,000, by depositing with the trial court a like amount of securities on or before December 4, 1995, being fourteen (14) days following the date of the hearing.

Dr. Isern has perfected his appeal and the Watsons have perfected a cross-appeal. The sole issue presented by this motion consists of our review of the actions of the trial court in reducing the amount of required supersedeas security deposit to suspend the execution of a final judgment in a personal injury case.

This issue has been previously addressed by this Court in Laird v. King, 866 S.W. 2d 110 (Tex.App.--Beaumont 1993, Orig. Proceeding). In Laird the Court stated:

In briefest summary, we hold that the clear and manifest legislative intent in the passing and promulgating of TEX. CIV. PRAC. & REM. CODE ANN. §§ 52.002 and 52.005 was to make certain that judgments rendered in personal injury cases required a full supersedeas bond equal to the amount of the judgment, plus interest, plus costs. *Id.* at 115. Therefore, for the reasons stated in Laird, we here hold that the trial court erred in allowing less supersedeas security than required by law in a personal injury case. Accordingly, we (1) set aside the trial court's order allowing the supersedeas of the judgment to be reduced to the sum of $500,000, and (2) order that appellant file a full supersedeas bond or security deposit equal to the amount of the judgment, plus interest and cost, in order for appellant to supersede enforcement of the judgment.

In accordance with Rule 49(c), execution on the judgment shall be suspended for twenty (20) days from the date this order is served on the parties. If appellant desires to supersede enforcement of this judgment, appellant may file an additional bond or security deposit in accordance with this opinion with the district clerk. A certified copy of any such additional bond or security deposit shall also be filed with this Court. However, the security deposit previously filed

shall not be released. If appellant fails to file an additional bond or security deposit in accordance with this opinion or otherwise supersede enforcement of the judgment within the above twenty (20) day period, the clerk shall notify the trial court that execution may be issued on the judgment.

Ron Carr

* JUSTICE
Opinion Delivered March 21, 1996
Do Not Publish

Before Burgess, Stover, and Carr, JJ.

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*The Honorable Ron Carr, sitting by assignment pursuant to TEX. GOV'T CODE ANN. § 74.003(b) (Vernon 1988).

APPENDIX C

NO. A-118,347

HELEN WATSON, et vir § IN THE DISTRICT COURT OF
vs. § JEFFERSON COUNTY, TEXAS
REUBEN A. ISERN, M.D. § 60TH JUDICIAL DISTRICT

ORDER ON DEFENDANT'S MOTION FOR ALTERNATIVE SECURITY

On the 17th day of November, 1995, came on to be heard the Motion for Alternate Security of defendant Reuben A. Isern, M.D. The Court, after considering the motion, the response thereto, and the evidence presented at the hearing, makes the following findings:

1. That the final judgment awarding damages in this case to Mrs. Helen Watson in the amount of Three Million Ninety-One Thousand, Four Hundred Ninety-Five Dollars and Forty-Three Cents ($3,091,495.43), and to Mr. Rix Watson in the amount of Seventeen Thousand Seven Hundred Twenty-Three Dollars and Eighty-One Cents ($17,723.81);

2. That a supersedeas bond in the amount of the judgment, interest, and costs would be in excess of Three Million One Hundred Nine Thousand Two Hundred Nineteen Dollars and Twenty-Four Cents ($3,109,219.24);

3. That defendant Dr. Isern's professional carrier, Insurance Corporation of America, takes the position that he has only $500,000.00 in professional liability insurance coverage under the 1982-83 policy purchased by Dr. Isern;

4. That Dr. Isern's professional insurance carrier,

Insurance Corporation of America, is either unwilling or unable, but in any event will not, post the full amount of the judgment, plus interest and costs, as a supersedeas bond to suspend execution;

5. That Dr. Isern does not have the financial resources or ability to post a supersedeas bond in the amount of the judgment, interest and cost;

6. That Dr. Isern does not want to declare bankruptcy, but will declare bankruptcy if alternative security is not ordered;

7. That Dr. Isern's professional insurance carrier, Insurance Corporation of America, is willing to post the amount of $500,000.00 in bonds in the treasury of this Court to suspend execution if this Court orders alternative security;

8. That in the event Dr. Isern declares bankruptcy, the plaintiffs will be left with a bankrupt debtor, and no posted security to secure any portion of the judgment; and

9. That the $500,000.00 in bonds offered by Dr. Isern's insurer, Insurance Corporation of America, will adequately protect the judgment creditors, Helen and Rix Watson, in the best manner possible under the facts and circumstances of this case.

Therefore, after notice to the plaintiffs and a hearing on defendant's Motion for Alternate Security, this Court has concluded that (1) posting the amount of the bond or deposit will cause irreparable harm to the judgment debtor, Dr. Isern, and (2) not posting the bond or deposit will cause no substantial harm to the judgment creditors, the Watson plaintiffs.

It is therefore ORDERED, ADJUDGED AND

DECREED that Dr. Isern is permitted to post alternate security in the form of the Five Hundred Thousand Dollars ($500,000.00) in bonds offered by his professional insurance carrier, Insurance Corporation of America.

It is further ORDERED, ADJUDGED AND DECREED that such offered alternate security be posted within fourteen (14) days.

It is further ORDERED, ADJUDGED AND DECREED that execution or enforcement of the judgment in this case is stayed, and that no execution or enforcement proceedings may proceed without further order of this Court.

Signed on this the 29th day of November, 1995.

(signed) Gary Anderson

Judge Presiding

APPENDIX D

In the Court of Appeals
Ninth District of Texas at Beaumont

No. 09-95-34 CV

REUBEN A. ISERN, M.D., Appellant
V.
HELEN WATSON AND RIX WATSON, Appellees

On Appeal from the 60th District Court
Jefferson County, Texas
Trial Cause No. A-118347

O R D E R

In accordance with the opinion and judgment of the Supreme Court in *Isern v. Ninth Court of Appeals*, No. 96-0330 (Tex. June 14, 1996)(not yet reported), the Court vacates its March 21, 1996, order on supersedeas of judgment.

ORDER ENTERED June 20, 1996. PER CURIAM